whenever an absolute rule of property is in defeasance of intention, as is the Rule in *Shelley's Case*.[13]

These principles were involved in a recent Georgia case. *Phinizy* v. *Wallace* (Ga. 1911) 71 S. E. 896. Real property was devised to trustees for four nieces, share and share alike, "to be settled on them and their children male and female" when they reached the age of 19, and "if after the marriage of any of these beneficiaries, a child is born and survives its mother, and then also dies leaving no issue, then the share it obtains from its mother shall revert, etc." The court refused to find an estate tail on the ground that the statute made such estates illegal and forbade their implication; and gave the nieces a fee simple subject to be reduced to a life estate with remainder over to the children of such niece if she should marry and have issue, with other limitations by way of executory devises. As it is well settled that technical words in a will are given their legal meaning unless the contrary clearly appears,[14] on the ground that the law presumes everyone to be acquainted with its rules of interpretation,[15] it would seem that the word "children," should have been construed as creating a fee tail,[16] irrespective of whether such estate was by statute illegal. However, even admitting that the statute operated as a prohibition upon the finding of an estate tail, the court has evolved a series of limitations which clearly violate the rule that only such gifts as are expressed or clearly implied can be given validity. A joint tenancy of parent and children would be just as consistent with the words of the will as a defeasible fee, and the only alternative to construing the limitation as a fee tail, which the statute would execute into a fee simple, would seem to be to hold void that item of the will. When a decision such as the foregoing is considered in connection with such cases as those wherein the court provides for an alternative event in a manner not expressed but clearly intended by the testator,[17] or supplies the object of a devise by reference to a preceding clause in the will,[18] it is apparent that in certain cases courts do actually make wills for testators, and it seems that so long as the primary intention is kept strictly in view, such interference by a court is justifiable as the only solution of the dilemma produced by the rules that, on the one hand, intention must govern, and, on the other, that the expressions must be taken as they are. It would seem that the interests of justice would be best served if this course were frankly pursued.

NOTICE AS THE COMMON CONTROLLING FACTOR IN ADVERSE POSSESSION AND PRESCRIPTION.—The doctrine that the acquisition of title by adverse possession depends upon the inaction of the true owner of

242. Nor could this situation be affected by the doctrine of *cy pres*, as the application of that doctrine to the rule against perpetuities is limited to a succession of limitations to issue which are thereby cut down to an estate tail, and it should not be extended. 1 Jarman, Wills, (6th Eng. ed.) 289; Gray, Rule against Perpetuities, (2nd ed.) § 643 *et seq.*

[13]Van Grutten *v.* Foxwell L. R. [1897] A. C. 658, 666.

[14]Gardner, Wills, 372.

[15]2 Jarman, Wills, (6th Eng. ed.) 2205, 2206.

[16]Wild's Case (1599) 6 Co. 17.

[17]Doe d. Leach *v.* Micklem (1805) 6 East 486.

[18]Doe d. Wickham *v.* Turner (1823) 2 D. & Ry. 398.

the land rather than upon the conduct of the disseisor,[1] upon a presumption of right arising from the former's long acquiescence in a wrong,[2] gives rise to certain well settled rules. Thus possession must be actual, for otherwise acquiescence evidently cannot be presumed;[3] it must be continuous, for disconnected trespasses do not constitute dispossession;[4] while any occupancy consistent with the title of the true owner obviously is not to be deemed adverse.[5] Finally, it is usually laid down as the fundamental requisite that the possession must be open and notorious.[6] Open and notorious possession, however, is simply that from which the law presumes notice to the true owner of the adverse claim,[7] and accordingly actual notice renders notoriety immaterial.[8] The statement, therefore, is only an approximation of what seems to be the true fundamental rule, that the acts relied on as constituting adverse possession must be such as to give notice, actual or implied, to the true owner as a reasonable man, that another is using the land as his own.[9] The same rule underlies the doctrine of constructive possession under color of title. The actual possession in this manner of part of a definite tract of land is such notice to the owner as to put him upon inquiry as to the entire extent of the adverse claim, which of course will be measured by the description in the deed.[10] These principles were illustrated in the recent case of *Crowe Coal & Mining Co.* v. *Atkinson* (Kan. 1911) 116 Pac. 499. The owner of certain mines sought an injunction to restrain the defendants, owners of the surface, from interfering with its mining operations. The defendants pleaded title to the mines by adverse possession. The court held that the defendants' possession, being only of the surface, did not extend to the mines. The normal rule that possession of the surface constitutes possession of all below it,[11] plainly cannot apply where the title to the minerals has been severed from the title to the surface,[12] for in that case possession of the surface is not an infringement of the rights of the owner of the mine, and therefore does not give him the necessary notice of the hostile claim.[13] A similar but more difficult question is presented where the

[1] 10 COLUMBIA LAW REVIEW 761.

[2] Thompson *v.* Pioche (1872) 44 Cal. 508; Brown *v.* Cockerell (1858) 33 Ala. 38; Pray *v.* Pierce (1811) 7 Mass. 381.

[3] Hathorne *v.* Stinson (1835) 12 Me. 183; Hawk *v.* Senseman (Pa. 1820) 6 S. & R. 21.

[4] Jackson *v.* Schoonmaker (N. Y. 1807) 2 Johns. 230; Polack *v.* McGrath (1867) 32 Cal. 15; Travers *v.* McElwain (1899) 181 Ill. 382; Royal *v.* Lisle (1854) 15 Ga. 545.

[5] Reading *v.* Royston (1702) 2 Salk. 423; Fairclaim *v.* Shakleton (1770) 5 Burr. 2604.

[6] 3 Washburn, Real Property, (6th ed.) § 1963.

[7] Murray *v.* Hoyle (1890) 92 Ala. 559.

[8] Trotter *v.* Neal (1887) 50 Ark. 340; Clarke *v.* Gilbert (1872) 39 Conn. 94.

[9] Pray *v.* Pierce *supra;* Parkersburg Industrial Co. *v.* Schultz (1897) 43 W. Va. 470; Denham *v.* Holeman (1858) 26 Ga. 182.

[10] 6 COLUMBIA LAW REVIEW 582.

[11] 10 COLUMBIA LAW REVIEW 70.

[12] Catlin Coal Co. *v.* Lloyd (1899) 180 Ill. 398; Marvin *v.* Brewster Iron Mining Co. (1879) 55 N. Y. 538.

[13] Plummer *v.* Iron Co. (1894) 160 Pa. 483.

defendant in addition to holding rightful possession of the surface has also unlawfully taken some of the minerals. Here again, however, unless the defendant has color of title to the minerals, it is difficult to conceive how his possession can extend beyond that part which he has actually mined.[14]

A striking similarity to the foregoing rules, seldom directly recognized in the authorities, appears in the principles governing the acquisition of rights by prescription. The basis of the doctrine is that from such long-continued use, acquiesced in by the owner of the servient tenement, the existence of a lost grant is presumed.[15] The user relied upon must be continuous, and adverse, and open,[16] for the owner of the servient tenement cannot be said to have acquiesced in a use which is not such as to have given him notice. The difficulty chiefly arises in two situations. In cases of intermittent user, it is submitted that an application of the same rule, that of notice, which here would be implied from the frequency of the user, will furnish the solution.[17] Thus the use of water during certain months of the year for irrigation may be sufficient to create the right,[18] as likewise a continued taking of ice during the winter months.[19] A second and similar question is the determination of the extent of such a right. It is commonly said that this is measured by the user in which it originated,[20] but the extent of the user is clearly no more than evidence of the terms of the fictional lost grant,[21] and the right can therefore extend only so far as it has been brought by the user to the notice of the presumed grantor, whose acquiescence can only so far be implied. Thus, for instance, where a dam has been built the right to flood the land of another is limited to that which has actually been flooded during the prescriptive period, and does not extend to all land which the dam is capable of flooding.[22] It therefore appears that the same rule governs the acquisition of incorporeal rights by prescription as applies to the acquisition of corporeal rights by adverse possession: namely, that the acts relied on to constitute prescription must be such as reasonably to warn the owner of the servient tenement of the character and extent of the use which is being made of his land.[23]

DUTY OF LANDOWNERS TO TRESPASSING CHILDREN.—The common-law duty of an owner[1] of land to a trespasser is to refrain from inflicting upon him willful or wanton injury.[2] In order not to violate this

[14]French *v.* Lansing (N. Y. Supreme Court, 1911); not yet reported.

[15]Washburn, Real Property, (6th ed.) §§ 1253, 1254.

[16]Lewis *v.* N. Y. & Harlem R. R. Co. (1900) 162 N. Y. 202.

[17]Bunten *v.* Chicago, etc. R. R. Co. (1892) 50 Mo. App. 414; Bodfish *v.* Bodfish (1870) 105 Mass. 317.

[18]Hesperia Land & Water Co. *v.* Rogers (1890) 83 Cal. 10.

[19]See Hinckel *v.* Stevens (N. Y. 1898) 35 App. Div. 5.

[20]8 COLUMBIA LAW REVIEW 401.

[21]Wimbledon Conservators *v.* Dixon (1875) 1 Ch. R. 362.

[22]Mertz *v.* Dorney (1855) 25 Pa. 519; Gilford *v.* Winnipiseogee Lake Co. (1872) 52 N. H. 262.

[23]Washburn, Real Property, (6th ed.) § 1253.

[1]The term "owner" will be used to denote the one responsible for acts done on the land.

[2]Burdick, Torts, (2nd ed.) 343.